Supreme Court, U. S.
FILED
AUG 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term

No. 78-298

MARY W. ALLEN,

Petitioner,

v.

ATLANTIC NATIONAL BANK,
L.E. WILLIS, TRUSTEE,
and
WALTER H. RIDDICK, SR., TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

~~BRIEF FOR THE PETITIONER.~~

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING WRIT	10
CONCLUSION	11

APPENDIX

BILL OF COMPLAINT	1A
ANSWER	5A
OPINION OF TRIAL COURT AFTER OCTOBER 7TH, 1977 HEARING ON ALLEGED TRUTH IN LENDING VIOLATION	6A
DECREE	8A
ASSIGNMENT OF ERROR RAISING TRUTH IN LENDING VIOLATION FOR MARY W. ALLEN'S PETITION FOR APPEAL FILED IN THE SUPREME COURT OF VIRGINIA ON JANUARY 25, 1978	10A
SUPREME COURT ORDER DENYING PETITION FOR APPEAL	11A

TABLE OF CITATIONS

	Page
Sapenter v. Dreyco, Incorporated, 326 F. Supp. 871 (E.D. Louisiana) affirmed 450 F 2d 941 (5th Cir.) cert. denied 406 U.S. 920, 92 S. Ct. 1775, 132 L. Ed. 2d 120 (1971)	11
Statute Involved	
15 U.S.C.A., Section 1602 (h)	2,5, 10,11, 12
15 U.S.C.A., Section 1603	5, 10, 12
15 U.S.C.A., Section 1635	2, 3, 6, 7, 9,10, 11,12
28 U.S.C.A., Section 1257 (3)	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

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No._____

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MARY W. ALLEN,

Petitioner,

v.

ATLANTIC NATIONAL BANK,
L. E. WILLIS, TRUSTEE,
And
WALTER H. RIDDICK, SR., TRUSTEE,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Mary W. Allen, hereby petitions for a Writ of Certiorari to review the decision of the Virginia Supreme Court made on June 1, 1978 which affirmed the decision of the Trial Court.

OPINIONS BELOW

The opinion of the Virginia Supreme Court decided on June 1, 1978 denying Mary W. Allen's Petition for Appeal is in the Appendix at Page 11A. The opinion of the Trial Court in setting aside the jury verdict for fraud and misrepresentations, and failing to find a violation of 15 U.S.C.A., Sec. 1635 is reproduced in the Appendix at Page 6A. Neither the opinion of the Virginia Supreme Court nor the opinion of the Circuit Court of the City of Portsmouth will be officially reported.

JURISDICTION

The order sought to be reviewed was made and entered on June 1, 1978. No petition for rehearing was made nor was there any extension granted to file this Petition for Certiorari. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C.A., Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is there a Consumer Credit transaction under 15 U.S.C.A., 1602 et seq where a homeowner borrows money on her residence which was free from encumbrances and gives the funds borrowed to her son who in turn uses the funds to clear up his financial affairs in his business?

2. Is a homeowner entitled to notice of rescission under 15 U.S.C.A., 1635, before a homeowner places an encumbrance on her home which encum-

brance secures an indebtedness made by a homeowner to help her son in his financial affairs where the son uses the funds to clear up financial affairs in his business?

STATUTE INVOLVED

Section 15 U.S.C.A., Section 1635, "Right of rescission as to certain transactions - Disclosure of obligor's right to rescind", provides as follows:

> (a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any

obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor

shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

Section 1602 provides:

(h) The adjective "consumer" used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes.

Section 1603 - Exempted Transactions provides:

(1) Credit transactions involving extensions of credit for business or commercial purposes.....

STATEMENT OF THE CASE

The petitioner, a homeowner in the City of Portsmouth, filed a complaint against Atlantic National Bank and

two Trustees under a deed of trust asking the Court to set aside a deed of trust securing Atlantic National Bank for a loan it made to the petitioner and further, asking the Court to set aside a foreclosure deed where Atlantic National Bank became the owner of the property. Petitioner sought rescission of the deed of trust and of the foreclosure deed on account of the fraud and misrepresentation of Atlantic National Bank and on account of Atlantic National Bank's violation of 15 U.S.C.A., Section 1635. The Bank denied any wrongdoing. A hearing was held with a jury to determine whether Atlantic National Bank made any misrepresentations to induce the petitioner into placing a deed of trust on her property. The jury, in an issue out of chancery, found that the Bank did make misrepresentations but the Court set aside the jury's verdict (see App. 7A - Opinion of Trial Court). A separate hearing was held on the issue as to whether Atlantic National Bank violated 15 U.S.C.A., Sec. 1635 by not giving the petitioner notice of rescission before she placed an encumbrance on her property. The petitioner maintained that Atlantic National Bank's loan to her was a consumer credit transaction and she was entitled to notice of rescission. No notice of rescission was given and the Bank maintained that it did not have to give notice of rescission since the loan to the petitioner was an exempt transaction as the extension of credit by the Bank was for business or commercial purposes. The Trial Court found there was no violation of 15 U.S.C.A., Section 1635 and entered judgment for the defendant

(see App. 8A). Petitioner appealed to the Supreme Court of Virginia alleging that there was a violation of 15 U.S.C.A. Section 1635 since she was not given notice of rescission when she placed an encumbrance on her home (App. 10A). The Supreme Court of Virginia denied petitioner's petition for appeal on June 1, 1978 (App. 11A).

The petitioner was the owner of twelve lots in Portsmouth, Virginia, and her house where she lived rested on two of the twelve lots. Petitioner's son, Norman Allen, was in the business of counseling people to cancel their whole life insurance, buy term insurance and invest the premium savings. Allen was also in the land development business. Allen got in financial trouble when he double financed a boat and one of the creditors that financed the boat threatened criminal action against Allen unless he paid off the amount Allen borrowed to purchase the boat. The petitioner agreed to help her son and went to Atlantic National Bank and borrowed Twenty-three Thousand Dollars ($23,000.00) for the benefit of her son. The petitioner signed a Note for Thirty-one Thousand Five Hundred Nine and 60/100 Dollars ($31,509.60) (see Allen Exhibit 10) which represented Twenty-three Thousand Dollars ($23,000.00) in loan proceeds, Eight Thousand Forty-nine and 60/100 Dollars ($8,049.60) in add on interest and Four Hundred Sixty Dollars ($460.00) for points (18). The Note of Thirty-one Thousand Five Hundred Nine and 60/100 Dollars ($31,509.60) was secured by a deed of trust on Mrs. Allen's property which included her home (see

Defendant's Exhibit E). At the time this deed of trust was placed on her property, her home was free of all encumbrances. No notice of rescission was given to the petitioner prior to placing an encumbrance on her home (24,28,160). Atlantic National Bank did not dispute the fact that Mrs. Allen was not given notice of rescission. The deed of trust signed by the petitioner also secured several past due notes of her son as a result of his business ventures (114). There was no evidence that the petitioner would have encumbered her property without receiving the loan proceeds of Twenty-three Thousand Dollars ($23,000.00). The petitioner's daughter also borrowed Fourteen Thousand Seventy-six Dollars ($14,076.00) from Atlantic National Bank to help out the petitioner's son and the petitioner's deed of trust secured her daughter's obligation also. At closing, Thirty-seven Thousand Seventy-six Dollars ($37,076.00), (the petitioner's loan of Twenty-three Thousand Dollars ($23,000.00) and Fourteen Thousand Seventy-six Dollars ($14,076.00), was disbursed as follows:

1. Twenty-eight Thousand Two Hundred Twelve Dollars ($28,212.00) to Norman Allen's attorney which was the outstanding balance owed on a boat financed by General Electric Credit. Allen's attorney paid General Electric Credit Twenty-three Thousand One Hundred Twenty-eight Dollars ($23,128.00) and Allen received Five Thousand Eighty-four Dollars ($5,084.00) since General Electric Credit agreed that Allen could pay the balance of Five Thousand Eighty-four Dollars ($5,084.00) in installments (see Defendant's Exhibit A).

2. Five Thousand Eight Hundred Twenty-five Dollars ($5,825.00) went to the sellers of a townhouse that Mrs. Allen's daughter purchased (see Plaintiff's Exhibit 22).

3. Three Thousand Thirty-nine Dollars ($3,039.00) went to Norman Allen (see Plaintiff's Exhibits 24 and 25).

The evidence was conflicting as to the purpose for which the boat was used. Allen maintained that he used the boat for his personal pleasure while a bank official maintained that the boat was used to entertain clients of Allen and show clients investment property (see 43, Exhibit 20, 110). Exhibit H did show that Allen's business made one mortgage payment on the boat but Allen indicated that this money was accounted as a draw to Allen. Allen maintained that he used the proceeds from the loan for his personal business but evidence also showed that large deposits were made in the business account of his business at the time he received the loan proceeds (65).

The deed of trust that the petitioner placed on her home was later foreclosed because of the petitioner's failure to pay the Thirty-one Thousand Five Hundred Nine and 60/100 Dollars ($31,509.60) Note she signed at the Bank and petitioner maintained this action on the ground that she had a right to rescind the deed of trust since she was not given notice of rescission under 15 U.S.C.A., 1635.

REASONS FOR GRANTING WRIT

Your petitioner states that this Petition for Certiorari should be granted in this case because the Supreme Court of Virginia in affirming the decision of the Trial Court has decided a Federal question of substance contrary to the meaning and intent of 15 U.S.C.A. 1602 (h), 15 U.S.C.A. 1603, and 15 U.S.C.A. 1635.

15 U.S.C.A. 1635 gave the petitioner right of rescission if she was involved in a consumer credit transaction. 15 U.S.C.A., 1602 (h) defines a consumer credit transaction as

> "one in which the party to whom credit is offered or extended is a natural person, and the money, property or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes".

15 U.S.C.A. 1603 exempts credit transactions involving extensions of credit for business or commercial purposes.....

There is a consumer credit transaction if the money borrowed is purely for personal, family, household or agricultural purposes. The extension of credit to the petitioner was not for a business purpose, although it served a business purpose for her son. The petitioner's purpose in borrowing the

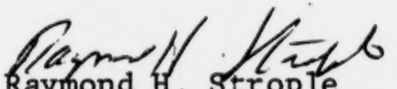
money and encumbering her home was to assist her son and the money went to her son who in turn used the money to pay-off financial obligations related to his business. In Sapenter v. Dreyco, Incorporated, 326 F. Supp. 871 (E.D. Louisiana) affirmed 450 F 2d 941 (5th Cir.) cert. denied 406 U.S. 920, 92 S. Ct. 1775, 132 L. Ed. 2d 120 (1971), the District Court held in determining whether a particular transaction is exempt from the Truth In Lending Act that the purpose of the transaction or extension of credit is controlling. The Trial Court and the Virginia Supreme Court improperly interpreted 15 U.S.C.A. 1602 (h) and 1603 when it held that 15 U.S.C.A. 1635 did not apply because there was not a consumer credit transaction. The funds were borrowed by the petitioner for personal and family reasons, and it was her son who decided to use the funds for a business purpose. Under the reasoning of the Virginia Supreme Court, the test of whether a creditor has to give notice of rescission is how the money was used by someone other than the borrower rather than what the purpose of the transaction was for the borrower. Petitioner submits that the decision of the Trial Court and the Virginia Supreme Court is contrary to the spirit, intent and language of the Federal Truth In Lending Act which Act was passed to protect the interest of the consumer.

CONCLUSION

Congress passed the Federal Truth In Lending Act and more particularly 15 U.S.C.A. 1635 to protect consumers

from encumbering their property without being advised of their right to have three days notice to rescind the transaction. The Virginia Supreme Court, by its Order affirming the decision of the Trial Court, has adopted an interpretation of the Act which circumvents the purpose and spirit of 15 U.S.C.A. 1635. Under the reasoning of the Virginia Supreme Court, the test is not what purpose the borrower needed the money for, but how the money was used after the borrower gave the money to a relative. This Court should grant the Petition for Certiorari to insure that Congress' language in 15 U.S.C.A. 1602 (h) and 1603 is carried out so the consumer will be protected.

Respectfully submitted,



Raymond H. Strople
Counsel for Mary W. Allen

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P.O. Box 1138
Portsmouth, Virginia 23705

APPENDIX

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

MARY W. ALLEN,	:
	:
Complainant,	:
	:
v.	:
	:
ATLANTIC NATIONAL BANK, L. E. WILLIS, TRUSTEE OF ATLANTIC NATIONAL BANK, And WALTER H. RIDDICK, SR., TRUSTEE OF ATLANTIC NATIONAL BANK,	:
	:
Defendants.	:

BILL OF COMPLAINT

NOW COMES Mary W. Allen and respectfully shows the following case:

1. Your complainant resides in the City of Portsmouth and owned in October of 1974 Lots Numbers 24, 12, 4, 20, 16, 18, 22, 14, 6, 8, 10 and 2 in Block 139 on the Plat of the Virginia Realty and Investment Company recorded in the Clerk's Office of the Circuit Court of the City of Chesapeake, Virginia, in Map Book 7, at pages 98, 99 and 100.

2. That the defendant, Atlantic National Bank, through its agents and employees, fraudulently induced and procured Mary W. Allen to sign a note dated October 15, 1974 payable to bearer at Atlantic National Bank for Thirty-one Thousand Five Hundred Nine and 60/100 Dollars ($31,509.60) and to sign a deed of trust dated October 15,

1974 from Mary W. Allen to L. E. Willis and Walter H. Riddick, Sr., a copy of which is attached hereto and said deed of trust being recorded in the Clerk's Office of the Circuit Court of Portsmouth in Deed Book 655, Page 294.

3. The said Mary W. Allen in said deed of trust conveyed all of the following described property to L. E. Willis, Trustee, and Walter H. Riddick, Sr., Trustee:

> All those certain lots, pieces or parcels of land, with the appurtenances, situate, lying and being in the City of Portsmouth, State of Virginia, and being known, numbered and designated as Lots Numbers 24, 12, 4, 20, 16, 18, 22, 14, 6, 8, 10 and 2 in Block 139 on the Plat of the Virginia Realty and Investment Company recorded in the Clerk's Office of the Circuit Court of the City of Chesapeake, Virginia, in Map Book 7, at pages 98, 99 and 100.

4. That the said Mary W. Allen signed said note and deed of trust based upon the representations and assurances of Atlantic National Bank through its agents and employees that they would release various lots from said deed of trust provided she paid Atlantic National Bank certain sums of money including the release of all of her lots upon the payment of Thirty-seven Thousand Dollars ($37,000.00); that the said Mary W. Allen would not have signed the above-mentioned note and deed of

trust but for the representations and assurances of the defendant, Atlantic National Bank.

5. That the said Atlantic National Bank refused to honor said agreement to release the lots of Mary W. Allen and interfered and precluded Mary W. Allen from attempting to comply with said agreement to release said lots from said deed of trust.

6. That on or about April 21, 1975, L. E. Willis, Trustee for Atlantic National Bank, foreclosed on the deed of trust previously executed by your complainant and recorded its deed of foreclosure in Deed Book 665, Page 667 in the Clerk's Office of the Circuit Court of Portsmouth, a copy of said deed of foreclosure is attached hereto, and sold said property to Atlantic National Bank which is the party that fraudulently induced Mary W. Allen to sign said note and deed of trust.

7. That in addition to the fraud and misrepresentations of Atlantic National Bank which induced and procured Mary W. Allen in executing said note and deed of trust, the Atlantic National Bank in its foreclosure did not follow the procedure as required by the Code of Virginia; that the said note and deed of trust were without consideration; that the said note was usurious and did not comply with the applicable truth in lending laws.

8. That in addition to the previous allegations, there is a resulting trust in Atlantic National Bank in favor of the complainant.

9. That your complainant has no adequate remedy at law.

10. That L. E. Willis and Walter H. Riddick, Sr. were the Trustees in the deed of trust executed by Mary W. Allen and recorded in Deed Book 655, Page 294.

11. That the said Atlantic National Bank is still the owner of the property.

WHEREFORE, your complainant is asking and praying that the Court rescind and void a note and deed of trust both dated October 15, 1974 as above-mentioned on account of the fraud and misrepresentation by Atlantic National Bank by its agents and employees; that in addition, the note and deed of trust should be voided because the note and deed of trust were without consideration and were in violation of the usury and truth in lending laws; that the foreclosed deed should be voided because the deed of trust executed by Mary W. Allen is void as above alleged; that in addition, the foreclosure deed should be voided because the sale was not conducted according to the Statutes of Virginia, and your complainant further asks the Court to stay a certain proceeding in the Circuit Court of Portsmouth entitled Atlantic National Bank v. Mary W. Allen, Law Docket No. 75-476 in which the said Atlantic National Bank is trying to evict the said Mary W. Allen from the property above-described until this suit is decided or in the alternative to consolidate 75-476 with this proceeding; that she be awarded reasonable attorney fees, costs and she may have whatever further relief as may be necessary.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

MARY W. ALLEN,	:	
	:	
Complainant,	:	
	:	
v.	:	IN CHANCERY
	:	DOCKET NO.
ATLANTIC NATIONAL BANK,	:	C-75-630
L. E. WILLIS, Trustee of Atlantic National Bank,	:	
WALTER H. RIDDICK, SR., Trustee of Atlantic National Bank,	:	
	:	
Defendants.	:	

ANSWER

Now comes the defendants, Atlantic National Bank, L. E. Willis, Trustee of Atlantic National Bank, and Walter H. Riddick, Sr., Trustee of Atlantic National Bank, by counsel, and for their answer to the Bill of Complaint exhibited against them say as follows:

1. The allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the Bill of Complaint are denied.

2. The allegations of paragraph 1 of the Bill of Complaint are admitted.

WHEREFORE, the defendants move that the motion for judgment exhibited against them be dismissed and that they be awarded their costs in this matter.

ATLANTIC NATIONAL BANK AND
L. E. WILLIS, TRUSTEE OF
ATLANTIC NATIONAL BANK, AND
WALTER H. RIDDICK, SR.,
TRUSTEE OF ATLANTIC
NATIONAL BANK

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

MARY W. ALLEN,	:
	:
Complainant,	:
	:
v.	:
	:
ATLANTIC NATIONAL BANK,	:
L. E. WILLIS, Trustee of	:
Atlantic National Bank,	:
WALTER H. RIDDICK, SR.,	:
Trustee of Atlantic	:
National Bank,	:
	:
Defendants.	:

OPINION OF TRIAL COURT
AFTER OCTOBER 7TH, 1977 HEARING
ON ALLEGED TRUTH IN LENDING VIOLATION

THE COURT: All right. I have ruled that I think that the problem here goes back to Mr. Allen and his mother would sign, as she said, she'd do anything to help her son. She would sign anything that they put before her. She has signed a statement that says the loan was -- she signed a consent to pledge her property for financial accommodation to Norman S. Allen, Mary A. Brown, Garland G. Brown, J.J. Goodman and Americal Leasing. On one of the other documents that we have introduced into

evidence, the address that she gave was that of a Greenwich Road address in Virginia Beach which was the address of one of Mr. Allen's corporations. Further, I think in fair play in equity, as Mr. Steingold pointed out, in the criminal proceedings had nothing to do with this, but she testified directly that the money was put into his business to get his business out of trouble. I'm not giving a direct quote. That was what she said. I don't think she can testify in one hearing one thing and come in and now change her testimony.

The same way with the suit, that she said she didn't know it was filed in this matter in Norfolk. I think she would be estopped to deny that because it was filed in her name by her attorney; and as I previously stated, I have indicated -- I'm not sure if I wrote you-all a letter or not, I thought I had -- that I'd certainly notified you-all that I've set the verdict aside on the issue out of chancery and now I'm going to ask that an order be drawn to enter final judgment in this matter for the defendants, plural.

It's unfortunate, but I think people go to the bank like this, they sign a lot of things relying on somebody else. You see it in mostly husband and wives. Certainly when you have sons and mothers or widows, it's unfortunate, but she relied -- she'd sign anything that was set before her and he got her in this. It's up to him to get her out of it.

MR. STROPLE: Your Honor, to make it clear, you just mentioned that you were going to set aside, but you're setting

aside the jury verdict today on the issue out of chancery and entering judgment on behalf of the defendants based on the hearing today and judgment will be entered, an order prepared by Mr. Steingold?

THE COURT: This will not be in effect until an order has been endorsed and --

MR. STROPLE: I object to the ruling of the court.

THE COURT: Note Mr. Stropple's exception to the ruling of the court.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

MARY W. ALLEN,	:	
	:	
Complainant,	:	
	:	
v.	:	IN CHANCERY
	:	DOCKET NO.
ATLANTIC NATIONAL BANK, Et Al,	:	C-75-629
	:	
	:	
Defendant.	:	

DECREE

THIS CAUSE came on this day to be heard on the Defendants' motion to set aside the verdict of the jury on the Issue Out of Chancery previously submitted to said jury, and was argued by counsel.

ON CONSIDERATION WHEREOF, this Court being of the opinion that the verdict

of the jury was contrary to the evidence and the law, that there was no evidence of fraud or misrepresentation submitted to said jury on which it could have found the Defendants, or any one of them, guilty of fraud or misrepresentation, and the Court being further of the opinion that said Issue Out of Chancery was merely advisory and not binding on this Court, and for other good cause, it is hereby,

ADJUDGED, ORDERED and DECREED that the jury's verdict on the Issue Out of Chancery be, and the same hereby is set aside and not binding on this Court.

And the Court having fully heard further evidence Ore Tenus without a jury on all other issues raised by all of the pleadings filed herein, including complainant's motion for attorney's fees and court costs allegedly due him for his representation in this matter, and on mature consideration whereof by the Court having heard the argument of Counsel thereon, it is the judgment of this Court that the Complainant shall be denied the relief prayed for in her Bill of Complaint, and it is so ADJUDGED, ORDERED and DECREED, and it is further ADJUDGED, ORDERED and DECREED that this Court finds for the Defendants and the Bill of Complaint filed herein by the Complainant is hereby Dismissed with Prejudice.

It further appearing to the Court that the hereinabove described Real Property is and has been wrongfully withheld by the Complainant from the Defendant, Atlantic National Bank, it is hereby ADJUDGED, ORDERED AND DECREED

that the Complainant, Mary W. Allen, vacate same within 34 days from the date of the entry of this Order, but enforcement of this Order shall be stayed for a period of 30 days from the date hereof conditioned upon Complainant filing a Notice of Appeal and posting a bond with corporate surety approved by the Clerk of this Court in the amount of $25,000.00 to indemnify the Defendant, Atlantic National Bank, the owner of said Real Property, against the loss of the value of said property and all other expenses incurred by said Atlantic National Bank, including but not limited to taxes, insurance and interest during the pendency of said appeal.

William H. Oast, Jr.
Judge

IN THE SUPREME COURT OF VIRGINIA

MARY W. ALLEN,

v.

ATLANTIC NATIONAL BANK.

ASSIGNMENT OF ERROR
RAISING TRUTH IN LENDING VIOLATION
FOR MARY W. ALLEN'S PETITION FOR APPEAL
FILED IN THE SUPREME COURT OF VIRGINIA
ON JANUARY 25, 1978

1. The Court erred in not holding that the Atlantic National Bank failed to comply with the Federal Truth in Lending Statute when it failed to notify Mrs. Allen of her right of rescission as required at the time when she placed a First Deed of Trust

on her home and the Court erred in not rescinding the deed of trust and foreclosure deed because of the Bank's failure to notify her of her right of rescission.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday, the 1st day of June, 1978.

MARY W. ALLEN,

Appellant,

v.

RECORD NO. 780106
Circuit Court No. C-75-629

ATLANTIC NATIONAL BANK, L. E. WILLIS AND WALTER H. RIDDICK, JR., TRUSTEES, ETC.,

Appellees.

SUPREME COURT ORDER
DENYING PETITION FOR APPEAL

From the Circuit Court of the City of Portsmouth.

Finding no reversible error in the judgment complained of, the Court refuses the petition for appeal filed in the above-styled case.

TESTE: ALLEN L. LUCY, CLERK
BY: DEPUTY CLERK

Supreme Court, U. S.
FILED
SEP 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-298

MARY W. ALLEN,
Petitioner,

v.

ATLANTIC NATIONAL BANK,
L.E. WILLIS, TRUSTEE,
and
WALTER H. RIDDICK, SR., TRUSTEE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
MOTION TO DISMISS APPEAL	I
ARGUMENT IN SUPPORT OF MOTION	I
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF PRIOR PROCEEDINGS	1
QUESTIONS PRESENTED	1
STATEMENT OF FACTS	2
ARGUMENT	
I. THE COURT DID NOT ERR IN HOLDING THAT MARY W. ALLEN WAS NOT ENTITLED TO A NOTICE OF A RIGHT TO RESCIND UNDER THE TRUTH IN LENDING ACT INASMUCH AS THE TRANSACTION INVOLVED HEREIN WAS OF A BUSINESS NATURE.	4
CONCLUSION	12

TABLE OF CITATIONS
FOR MOTION TO DISMISS APPEAL

Cases	Page
Baltimore, etc. R. Company v. Hopkins, District Col. 1889, 9 S. Ct. 503, 130 U.S. 210, 32 L. Ed.	III
Cook County v. Calumet & C. Canal & Dock Co., 138 U.S. 635, 34 L. Ed. 1110	IV
Kennard v. Nebraska, 130 U.S. 210, 46 L. Ed. 1175	III
Sevier v. Haskell, 14 Wall 12, 20 L. Ed. 827	IV
Steines v. Franklin County, 14 Wall 15, 20 L. Ed. 846	IV

Statutes	
15 USCA Section 1602	III
15 USCA Section 1603	II, III, IV
15 USCA Section 1635	II, IV
28 USCA Section 1257(3)	I, II, III

TABLE OF CITATIONS

State	Page
Massie v. Firmstone, 134 Va. 450 (1922)	7
Federal	
Andrucci v. Gimbel Bros.,Inc., 365 F. Supp. 1240 (1973)	11
Puckett v. Georgia Homes, 369 F. Supp. 614 (D.S.C. 1974)	10, 11
Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (D. C. La. 1971) aff'd per curiam, 450 F. 2d 941 (5th Cir. 1971)	9, 10, 11
W. T. Grant Co. v. C.I.R., 483 F. 2d 115	11
Statutes and Other Authorities	
15 USCA Section 1601	11
15 USCA Section 1602	5
15 USCA Section 1603	5, 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

NO. 78-298

MARY W. ALLEN,

Petitioner,

v.

ATLANTIC NATIONAL BANK,
L. E. WILLIS, TRUSTEE,
and
WALTER H. RIDDICK, SR., TRUSTEE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION TO DISMISS APPEAL

Atlantic National Bank and the other named respondents herein respectfully move the Court for dismissal of the Petition for a Writ of Certiorari on the ground that this Court lacks jurisdiction as asserted in Petitioner's brief, jurisdiction being sought under 28 U.S.C.A., §1257(3).

I

ARGUMENT IN SUPPORT OF MOTION

The aforementioned statute on which Petitioner relies, to-wit, 28 U.S.C.A., §1257(3), reads as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "3. By Writ of Certiorari where the validity of a treaty or statute is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaty or statute of, or commission held or authority exercised under the United States. June 24, 1948(c) 646, 62 Stat. 929."

Under 28 U.S.C.A. §1257, the Supreme Court of the United States may review the final judgment rendered by the highest Court of a State on appeal when the judgment or decree draws into "question the validity of a treaty or statute of the United States and the decision is against its validity." The case at bar does not contest the validity of a treaty or statute. Just the opposite, the Petitioner wants to take 15 U.S.C.A. §1635 and §1603 on its face and say, "The bank loan was not for a business purpose." This is a question of fact for the trier of fact to decide - not a question of law.

II

Neither side in the case at bar wishes to contest the validity of 15 U.S.C.A. §1635 and §1603. Rather, the Petitioner seeks to use 15 U.S.C.A. §1635 as the means of avoiding repayment of the loan to said Bank. It is crystal clear from a reading of the Petitioner's brief that the validity of Title 15 U.S.C.A. §1602, et seq., has never been drawn into question in the proceedings prior to the filing of this Petition by either the Petitioner or the Respondents. The sole question submitted in the lower Court and in this Court by Petitioner's brief is whether or not the transactions involved the extension of credit for business or commercial purposes, in which event there is no right of rescission under Title 15 U.S.C.A. §1603, as the statute provides that credit transactions for business or commercial purposes are specifically exempt. Even under the most charitable interpretation of the Petitioner's brief one is unable to find where either of the parties, at this stage or at any other stage, raised the question of the validity of the statute hereinabove referred to and those referred to in Petitioner's brief. This Court has held in a long line of cases that the validity of a statute or treaty of the United States was not "drawn into question", under the meaning of Title 28, U.S.C.A. §1257(3) or under former statutes setting forth similar jurisdictional requirements every time rights claimed under a treaty or statute were controverted, nor was the validity of an authority every time an act done by such authority was disputed. Baltimore, etc. R. Company v. Hopkins, District Col. 1889, 9 S. Ct. 503, 130 U.S. 210, 32 L. Ed.; Kennard v. Nebraska, 130 U.S. 210, 46 L. Ed.

1175; Cook County v. Calumet & C. Canal & Dock Co., 138 U.S. 635, 34 L. Ed. 1110; Sevier v. Haskell, 14 Wall 12, 20 L. Ed. 827; Steines v. Franklin County, 14 Wall 15, 20 L. Ed. 846.

The Court should also refuse to take jurisdiction in this matter because there is no conflict of interpretation between United States Circuit Court of Appeal. The Court should also refuse to take jurisdiction because there is no conflict between State and Federal law. The Court should also refuse to take jurisdiction because neither side has called into question a violation of the United States Constitution.

This is the classic case of using the mere mention of the word "Federal" to get jurisdiction in the United States Court system. The Supreme Court has made it patently clear no Writs of Certiorari will be granted on appeal from the highest State Court unless there is a question as to the validity of a Federal law. Petitioners have never questioned the validity of 15 U.S.C.A. §1635 and §1603 from the inception, nor did the Respondents.

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STATEMENT OF PRIOR PROCEEDINGS

The Appellant's statement of prior proceedings in the lower Court is substantially correct.

QUESTIONS PRESENTED

1. Did the lower Court err in holding that Atlantic National Bank did not violate the Truth in Lending Act?

STATEMENT OF FACTS

In order to have a full and complete understanding of the transaction which was the subject of this suit, it is necessary to examine the "temper of the times" in which this transaction was entered.

Mary W. Allen, the appellant herein, had a son, Norman S. Allen, who along with another man named J. J. Goodman operated an unincorporated business named Trustee Security Development Company. Allen and Goodman were equal partners in the business.

A scheme was developed by the Goodman and Allen firm whereby they would persuade persons who had built up cash value in ordinary whole life insurance policies to cash in those policies, purchase decreasing term life insurance from Goodman and Allen, and turn over the balance of the cash value received from the sale of the whole life policy to Trustee Security for investment purposes. The alleged investments which Trustee Security made on behalf of its "clients" included a supposed purchase of land in Beech Mountain, North Carolina from a concern known as Carolina Caribbean Corporation, a scheme which ultimately resulted in Norman Allen's felony conviction for obtaining money under false pretenses.

In order to finance their business ventures, Goodman and Allen had borrowed money from many concerns, including the appellee, Atlantic National Bank.

In October of 1974, Allen was in deep financial difficulty. Not only was

he in default for certain loans he had taken out for the business, and unable to keep his commitments with Carolina Caribbean, but he was also being threatened with criminal prosecution because of dealings he had made concerning a 34 foot boat which he had "double-financed". It seems that when Allen purchased the boat, he did so through Citizens Trust Bank of Portsmouth, Virginia, giving a purchase money security interest in the boat to that institution. Later, Allen financed the same boat again through General Electric Credit Corporation which thought it was obtaining a first lien on the boat. When General Electric found out otherwise, it demanded the total amount due from Allen to pay off the boat.

Allen, realizing the desperate straits in which he found himself, went to Atlantic National Bank, with which firm he and his partner trading as Trustee Security already had several outstanding loans, and asked to borrow more money to pay off the GECC boat loan. Atlantic National Bank, which had already loaned Allen a great deal of money, refused to make any new loans unless the new loan and the prior indebtedness of American Leasing and Trustee Security were adequately collateralized, American Leasing being another business concern of Allen and Goodman.

Allen, himself, had no such collateral but asked his mother to encumber 12 lots, including two which contained her personal residence, to secure the loan to her son. The loan was made to Allen and the property was put up as collateral. The Bank at that time, at

the special instance and request of Norman Allen, who was to be making the payments on the loan, set forth an agreement by the terms of which Mrs. Allen could redeem her residence and two adjoining lots in case of Norman's default, upon the payment of $37,000.00 to Atlantic National Bank.

Norman Allen indeed defaulted on the loan. Atlantic National Bank took steps to foreclose on its security. It offered to accept $37,000.00 in accordance with the agreement reached between the parties, and release the residence and two adjoining lots, but Mrs. Allen could not or would not come forth with the funds, so the property was sold.

The Trial Court held that the Federal Truth in Lending Act had not been violated by Atlantic National Bank failing to disclose the right to rescind to the appellant, inasmuch as the transaction involved herein involved funds to be used for a business purpose and under the Federal Truth in Lending Statutes the right to rescind need not be disclosed for a business transaction.

ARGUMENT

I. THE COURT DID NOT ERR IN HOLDING THAT MARY W. ALLEN WAS NOT ENTITLED TO A NOTICE OF A RIGHT TO RESCIND UNDER THE TRUTH IN LENDING ACT INASMUCH AS THE TRANSACTION INVOLVED HEREIN WAS OF A BUSINESS NATURE.

The basic issue at hand and indeed the only issue is whether or not this transaction was a loan made for business or commercial purposes.

In her brief, appellant has quoted several sections of the Truth in Lending Act. Title 15 USCA §1603, entitled Exempted Transactions states as follows:

> "This subchapter (to-wit: The Truth in Lending Act) does not apply to the following: (1) credit transactions involving extensions of credit for business or commercial purposes..."

Thus, in order for the Truth in Lending Act to apply, the transaction involved must be a consumer credit transaction, to-wit: one for which the funds of the subject transaction were used primarily for personal, family, household or agricultural purposes. See 15 USCA §1602. Business transactions clearly do not fall within the coverage of the Act.

Appellant's own evidence is overwhelming that the loan was made for the benefit of Norman Allen, J. J. Goodman, Trustee Security Development Company and American Leasing. The appellant's own evidence established this. See testimony of Charles Reynolds, (Record at page 111). See also the testimony of Norman S. Allen wherein he stated that the discussions concerning the loan which is the subject of this suit concerned all his loans at the Bank, to-wit those prior loans which had been incurred as a result of his business. (R. 238 thru 240, et seq.)

Appellant introduced at trial Exhibit 15, a Memo to the Credit File in reference to Norman Allen which makes it clear that the Bank recognized the

obligations incurred on October 15, 1974 concerning Norman Allen as business transactions. The memo states, "Discussed with Norman Allen his total debt under the name of Trustee Security, Mary W. Allen, Garland Brown and American Leasing." (See Exhibit 15).

The memo went on to say that Norman Allen would make the obligation current. Trustee Security and American Leasing were business enterprises of Norman Allen. Consequently, appellant in her own evidence established the nature of the loan as commercial and for business purposes. Additionally, the deed of trust introduced at trial clearly states that it was to secure the notes of Trustee Security and American Leasing among others. (See Exhibit E).

In the record of the April 1977 hearing, starting at page 180, Mrs. Allen states that to the best of her knowledge the money obtained in this transaction was put into Trustee Security and the funds were used to keep the business going in October 1974.

As an indication of the record of the appellant's testimony indicates, the April hearing was the second time she had stated under oath that the funds procured by the loan were to be used for business purposes. The first time was at the felony trial of her son in the Circuit Court of Virginia Beach. Id.

By the rules set forth in the landmark case of Massie v. Firmstone, 134 Va. 450 (1922), a party cannot rise above her own testimony. Therefore, inasmuch

as Mrs. Allen admitted in the trial that the loan was for business purposes, she cannot now rise above her own testimony and allege that the transaction was not of a business nature.

The overwhelming weight of the evidence presented by the defendants at trial establish the transaction involved herein was of a business nature. The documents themselves reflect the business nature of the transaction. The deed of trust introduced as Exhibit E indicates that it was given to secure the business indebtedness of Norman Allen and J. J. Goodman for Trustee Security and American Leasing. Also, Exhibit L, the Consent to Pledge, which was signed by Mrs. Allen, gave as her address the business office of Trustee Security. (See Record at page 80).

As the testimony indicated, part of the money from the loan secured by the deed of trust in question was given to Norman Allen. (R. 63). Allen stated that he cashed the check, (R. 64) and cannot remember exactly where the money from the loan went. (R. 63). At the time in question, Allen's account had been closed out at Atlantic National Bank but he had gone back to said Bank and surreptitiously opend up a business account in the name of "RP". (R. 103). RP and Trustee Security, the business of Norman Allen, were one and the same. (R. 67). In fact, payment of property taxes on the secured property were paid out of the "RP" account to Mrs. Allen by Norman. (R. 73).

The evidence indicates that $28,000.00 was paid to Charles Moss, the

attorney of the appellant and her son Norman out of the loan proceeds, of which sum $23,000.00 went to pay off the double-financing of Norman's 34 foot yacht and $5,000.00 deposited in Norman's business account entitled "RP". (Exhibits F, G, H, & I) (R. 63, 68).

The testimony of the officers and agent of Atlantic National Bank who handled this transaction indicates that the loan was clearly of a business nature. The Bank's President stated clearly that the nature of the loan was that of a "wrap-around" transaction whereby Mrs. Allen's property would be used to secure the present indebtedness of Trustee Security with Atlantic National as well as the newer obligations, to-wit: The $5,000.00 cash paid to Norman Allen and the $23,000.00 paid on his behalf to GECC to pay off the loan on the yacht which Allen had "double-financed", said boat having been purchased by Norman Allen for use in his business to sell property in North Carolina. (See Record at 108, 110).

Oliver Harrell, the loan officer who closed the loan, stated without hesitation that he gave no disclosure of right to rescind under the Federal Truth in Lending Act because this was clearly a business transaction. (R. 161). Consequently, it is clear that the overwhelming weight of evidence, both documentary and circumstantially, and by testimony establishes that this was a business transaction. Indeed, as previously stated, appellant's own testimony establishes that fact.

Counsel for the appellant sets forth certain cases which he states stands for the proposition that Mrs. Allen should have the right of rescission in this case. It should be noted, however, that those cases are clearly distinguishable from the factual situation with which the Court was confronted here. Each of those cases dealt with a loan which was made to a consumer for home improvements, and was, in fact, used by the consumer to either build or improve his home.

None of those facts exist in this case, inasmuch as the money lent was admittedly not to Mary Allen for her purposes but to Norman Allen, the true party in interest, for his business purposes.

In the case of Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (D.C. La. 1971), aff'd per curiam, 450 F. 2d 941 (5th Cir. 1971), the Court was confronted with the exact question with which we are confronted here, that question being whether or not a particular transaction is exempted from the Truth in Lending Act by virtue of its being commercial in nature. In the Dreyco case, supra, the plaintiffs owned an apartment building in New Orleans. After falling behind in their payments on that building the plaintiffs executed a mortgage on their personal residence. That mortgage was given to the creditor to prevent its foreclosure on the apartment building. The mortgage was of a"wrap-around" nature quite similar to that given by Mrs. Allen in this case.

The plaintiffs in the Dreyco case later moved the Court for rescission under the Federal Truth in Lending Act inasmuch as the defendants allegedly did not comply with the disclosure provisions of the Act. The Dreyco Court held for the defendants on the basis that the Truth in Lending Act specifically exempts credit transactions involving extension of credit for business or commercial purposes.

The Court in reaching its decision set forth the following test:

> "In determing whether a particular transaction is exempt, therefore, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. Thus, in the instant case, the extension of credit was for a business purpose and §1635 (a) is of no avail to the plaintiffs even though the mortgage was placed on their residence." Id. at 874.

This text was also followed by the Unites States District Court for the State of South Carolina in the case of Puckett v. Georgia Homes, Inc., 369 F. Supp. 614 (D.S.C. 1974). In that case the purchaser of a mobile home moved for damages under the Truth in Lending Act for the alleged failure of the seller to make proper credit disclosures in connection with the mobile home transaction.

The Court held for the defendant on the basis that the purchased trailer was intended for rental purposes to supplement the purchaser's income from his regular employment and therefore was for business purposes and was exempt from the credit disclosure provisions of the Truth in Lending Act.

In the Puckett case, the Court referred to and cited with approval the decision in Dreyco.

Consequently, it is submitted that from the appellant's own testimony, and the overwhelming weight of the evidence, the funds used in this case were for the benefit of Norman Allen and his business transactions. Applying the approved test of the Dreyco case to the evidence, the Truth in Lending Act clearly does not apply and there was no duty upon Atlantic National Bank to give any notice of any right to rescission or make any disclosures required for a consumer transaction under 15 USCA §1601, et seq.

Clearly, Congress in enacting the Truth in Lending Act, 15 USCA §1601, et seq. never intended to entrap a lending institution in matters of this type. The purpose of the statute was to assure that a consumer debtor was made aware of the costs of obtaining credit. See e.g. W. T. Grant Co. v. C. I. R., §483 F. 2d 115 (2d Cir. 1973), not to deviously set traps by which windfalls could be reaped. Andrucci v. Gimbel Bros., Inc., 365 F. Supp. 1240 (1973). To allow recovery under the Truth in Lending Act under the circumstances in this case would clearly violate not only

the statute itself which expressly excludes business transactions from coverage, but also defeat the Congressional intent in enacting it. Id. (See also 15 USCA §1601 and §1603).

No substantial Federal question is involved in this controversy. Petitioner does not allege conflict in the various Circuits. Equally certain is that there is no allegation in Petitioner's Brief that the validity of the Statute involved herein has been drawn into question.

CONCLUSION

The Courts below have correctly interpreted the facts as applied to the Statute under which Petitioner seeks relief. The Petition and supporting record reflect the classic case of a mother willing to make the ultimate sacrifice, if need be, to rescue her wayward son in his ill-fated business ventures and nothing more.

This Honorable Court should dismiss the Petition for the reasons stated herein and Dismissal is respectfully requested.

Respectfully submitted,

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